Beverly Enterprises—Ohio d/b/a Northcrest Nursing Home *and* District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO, Petitioner. Case 8–RC–14773

November 26, 1993

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

We have granted review in this case to consider whether the licensed practical nurse charge nurses employed by Northcrest Nursing Home are supervisors within the meaning of Section 2(11) of the Act. In his Decision and Direction of Election, the Regional Director for Region 8 found that these individuals were not supervisors. For the reasons stated herein, we affirm his decision.

Precedential Background

Section 2(11)

Section 2(11) of the Act sets forth the statutory definition of supervisor by enumerating certain authorities in the disjunctive as follows:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[1]

The Wagner Act of 1935 did not distinguish between employees and supervisors. However, in reaction to a Supreme Court decision affirming the certification of a unit of foremen,[2] Congress passed the Senate version of the supervisory definition which is now contained in Section 2(11). The Senate report accompanying the definition stated, in relevant part,

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise.
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> . . . .
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> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. Rep. No. 105 80th Cong., 1st Sess. 3–4 (1947), *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 407, 409–410 (1985).

Consistent with this legislative background, the Board has been cautioned that in construing the supervisory exemption, it should refrain from construing supervisory status ''too broadly'' because the inevitable consequence of such a construction is to remove the individual from the protections of the Act. See *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970); see also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992); cf. *Schnuck Markets v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992). On the other hand, it has long been recognized that the supervisory definition is phrased in the disjunctive. Thus, possession of any one indicia of supervisory status provides a sufficient basis for finding supervisory authority. See *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

Pre-1974 Application of Section 2(11): Evolution of the ''Patient Care'' Analysis

The Board began its consideration of Section 2(11) in relation to charge nurses[3] in 1967 when jurisdiction was extended to proprietary hospitals and proprietary

[1] Until enactment of the 1947 Labor Management Relations Act, amending the Wagner Act of 1935, supervisors were included in coverage under the Act. Most of the language of Sec. 2(11) was contained in the original Senate bill (S. 1126) proposed by Senator Taft. However, the phrase ''or responsibly to direct them'' was added on the Senate floor pursuant to an amendment offered by Senator Flanders. See 93 Cong.Rec. 4677–4678 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1303–1304 (1985).

[2] *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), affg. 157 F.2d 80 (6th Cir. 1946), enfg. 64 NLRB 1212 (1945); underlying representation case reported at 61 NLRB 4 (1945).

[3] At the risk of oversimplifying the duties of a charge nurse, it appears to be the case that this term is used to refer to the nurse (RN or LPN) who is in charge of a wing of a hospital or nursing home during a particular shift. The charge nurse is ''responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed.'' *Abingdon Nursing Center*, 189 NLRB 842, 850 (1972). Typically the charge nurse assigns tasks to those nurses and aides working on the wing on her shift. The charge nurse also directs the work of these other employees.

nursing homes.[4] Assessment of supervisory status of charge nurses requires an accommodation of Section 2(11) with the express congressional mandate in Section 2(12) that professional employees not be excluded from the protection of the Act.[5] Professional, as well as technical, employees are defined as those who, inter alia, exercise independent judgment. Section 2(12)(a)(ii) of the Act defines professional work as ''involving the consistent exercise of . . . judgment in its performance.'' Technical work also involves the use of independent judgment.[6] Presumably the Employer has hired RNs and LPNs for their expertise, i.e., for their ability to exercise independent judgment involving patient care. Professional and technical employees should not lose the protections of the Act merely because they exercise independent judgment. Thus, the Board's task here is to determine whether the LPNs' exercise of independent judgment is limited to their exercise of technical expertise or has been extended to include the exercise of supervisory authority.

From 1967 until 1974, the Board decided a number of charge nurse supervisory cases and generally found the charge nurses were not supervisors.[7] In *Doctors' Hospital of Modesto*, supra, the Board drew a distinction between nurses who merely exercise professional duties and those who were vested with power to affect job status and pay. 183 NLRB at 951–952.

Health Care Amendments of 1974[8]

During the Congressional proceedings surrounding enactment of the 1974 Health Care Amendments which extended Board jurisdiction to nonprofit hospitals, a concern arose that professional health care employees might be automatically classified supervisory by the NLRB. When the bills were submitted to the Senate and House of Representatives, the accompanying Committee Reports reflected the Committees' conclusions that no amendment to Section 2(11) was necessary. The Committees summarized their decisions as follows:

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of ''supervisor.'' The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of ''supervisor'' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of

[4] In 1967 the Board began asserting jurisdiction over proprietary hospitals. See *Medical Center Hospital*, 168 NLRB 266 (1967). The first case involving charge nurses was also decided in 1967. See *University Nursing Home*, 168 NLRB 263, 264, 265 (1967) (asserting jurisdiction over proprietary nursing homes and related facilities and finding an LPN charge nurse to be a supervisor).

[5] Sec. 2(12) provides in relevant part that,

> The term ''professional employee'' means—
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> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . . .

[6] See, e.g., *Southern Maryland Hospital*, 274 NLRB 1470, 1471 (1985).

[7] See, e.g., *Doctors' Hospital*, 175 NLRB 354 (1969) (Board agreed with Regional Director's finding that RNs are highly trained professionals who normally inform lesser skilled employees regarding work to be performed for patients but ''their duties and authority in this regard are solely a product of their highly developed professional skills and do not constitute an exercise of supervisory authority in the interest of their employer''); later proceedings in this case, *Doctors' Hospital of Modesto*, 183 NLRB 950 (1970) (resolving challenged ballots); *Doctors' Hospital of Modesto*, 193 NLRB 833 (1971) (finding a violation of Sec. 8(a)(5) in refusal to bargain), enfd. 489 F.2d 772 (9th Cir. 1973). See also *Mountain Manor Nursing Home*, 204 NLRB 425, 426 (1973); *Leisure Hills Health Centers*, 203 NLRB 326, 326–327 (1973); *Madeira Nursing Center*, 203 NLRB 323, 324 (1973); *Garden of Eden Nursing Home*, 199 NLRB 16, 23–24 (1972); *Jackson Manor Nursing Home*, 194 NLRB 892, 896 (1972); *Eugene Good Samaritan Center*, 191 NLRB 35, 39, 41 (1971); *Abingdon Nursing Center*, supra; *Convalescent Center of Honolulu*, 180 NLRB 461, 461–462 (1969); *New Fern Restorium Co.*, 175 NLRB 871 at 871 (1969); cf. *North Dade Hospital*, 210 NLRB 588, 592 (1974) (LPN team supervisors with authority to effectively evaluate aides and other LPNs for purposes of wage increase and to effectively recommend discharge are supervisors); *Avon Convalescent Center*, 200 NLRB 702, 706 (1972), enfd. mem. 490 F.2d 1384 (6th Cir. 1974) (nurses with authority to assign and responsibly to direct aides were supervisors); *Garrard Convalescent Home*, 199 NLRB 711, 716 (1972) (LPN in question who had authority to hire and discharge was supervisor); *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (house supervisor has statutory authority to responsibly direct); *Autumn Leaf Lodge*, 193 NLRB 638, 638, 639 (1971) (Moody, the LVN in question, was a supervisor due to authority to grant time off and to effectively recommend discharge and permanent transfer as well as her status as sole LVN on night shift); *Rosewood, Inc.*, 185 NLRB 193, 194 (1970) (LPN charge nurses with authority to effectively recommend wage increases and to discipline aides held supervisory). We note that the unit scope holdings in *New Fern Restorium Co.*, 175 NLRB 871 (1969), and *Jackson Manor Nursing Home*, 194 NLRB 892 (1972), were overruled to the extent inconsistent with *Madeira Nursing Center*, 203 NLRB 323 fn. 4 (1973). However, this does not affect the 2(11) holding, i.e., the supervisory status issues, in those cases.

[8] National Labor Relations Act Amendments of 1974, Pub. L. 93–360, 88 Stat. 395.

> supervisory authority in the interest of the employer.
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> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 3946, 3951; and reprinted in NLRB, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, at 8, 13; H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same), reprinted in NLRB, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, at 269, 275 (1974). Congress did not amend Section 2(11) when it approved the Health Care Amendments on July 26, 1974.[9]

Supervisory issues are, of course, highly fact bound. Deciding whether an individual possesses any 2(11) indicia of supervisory authority often calls for making delicate, difficult, and even fine distinctions, and there are frequently gray areas. In almost any employment situation employees are given direction by other employees including more experienced, straw boss, technical, and professional employees. Whether that direction is routine or responsible or requires independent judgment is the focus of the litigation of these issues whether in the health care industry or not.

Post-1974 Decisions of the Board and Courts

Since 1974, the Board has utilized the ''patient care'' analysis as an aid to determining supervisory status of charge nurses to insure that they not be excluded from coverage simply because of their professional responsibility.[10] Stated briefly, that analysis examines whether the alleged supervisory conduct of the charge nurses is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer. For example, in *Newton-Wellesley Hospital*, 219 NLRB 699, 699–700 (1975), we stated,

> [T]he test for determining whether a health care professional is a supervisor is whether that individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer. [Footnote omitted.]

Patient Care Analysis: Assignment and Direction

In determining the existence of supervisory status, the Board must first determine whether the individual possesses any of the 12 indicia of supervisory authority and, if so, whether the exercise of that authority entails ''independent judgment'' or is ''merely routine.'' If the individual independently exercises supervisory authority, the Board must then determine if that authority is exercised ''in the interest of the employer.''

The Board has described that determination in the health care field in terms of a dichotomy between the interest of the employer and the interest of the patient. The statutory term ''in the interest of the employer'' connotes the employer's expectation of loyalty from individuals to whom it has delegated certain authorities.[11] Charge nurses exercise responsibilities in assigning work and directing employees in order to provide sound patient care. These responsibilities derive from the charge nurses' professional or technical status. When these responsibilities involve the use of the charge nurses' independent judgment, there will seldom exist the risk of a conflict of interest between the employer and employees such that the employer must be able to demand the nurses' loyalty in exercising those responsibilities. When making decisions concerning which aides to assign to specific patients, or the order in which tasks are to be performed, and in instructing aides in the proper methods of attending to patients' needs, charge nurses simply are not forced to choose between the interests of the employer and those of the other employees, because the two sets of interests will rarely diverge. (Likewise, in ''leadman'' cases outside the health care setting, when a skilled and experienced employee—e.g., a journeyman pipefitter assigns work to and directs a less skilled helper or apprentice, there is scant risk of a conflict of interest between the employer and the employees which would test the loyalty of the leadman.) By contrast, when charge nurses (or leadmen outside the health care

[9] In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Court stated that ''[t]he Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty'' noting that ''[i]n the health-care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients, a test Congress expressly approved in 1974. S. Rep. No. 93-766, p. 6 (1974).'' 444 U.S. at 690 and fn. 30. However, see *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1554 fn. 7 (6th Cir. 1992).

[10] In addition to using the patient care analysis in determining the status of RN charge nurses who are professional employees, *Centralia Convalescent Center*, 295 NLRB 42, 42–43 (1989), we also apply the same analysis to LPN charge nurses. See, e.g., *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989). LPN charge nurses, ''if not full-fledged professionals, [are] at least subprofessionals.'' *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983); see also *Barnert Memorial Hospital Center*, 217 NLRB 775 (1975) (LPNs are technical employees—''those who do not meet the strict requirements of the terms professional . . . but whose work . . . involv[es] the use of independent judgment and requir[es] the exercise of specialized training usually acquired in colleges or technical schools or through special courses.'').

[11] *NLRB v. Res-Care, Inc.*, supra at 1466 (citing *Packard Motor Co. v. NLRB*, 330 U.S. at 494–495 (1947) (dissenting opinion).

industry) effectively recommend or impose discipline, or effectively recommend or grant promotions and/or wage increases, the possibility that the interests of the employer and employees may diverge is obvious, and the employer can legitimately demand the loyalty of the charge nurse (or leadman). Accordingly, in the health care field, as in other industries, the authority on the part of more skilled and experienced employees to assign and direct other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status, whereas the authority to promote, demote, award raises, or discipline (or to effectively recommend those actions) is invariably found to confer supervisory status.

We recognize that the Employer has an interest in providing for patient care. Indeed, that is its business. Accordingly, it is argued, when an RN or LPN directs an aide to minister to a patient, the RN or LPN is necessarily acting in the interest of the employer. We find that argument too simplistic. As the Senate and House Committee reports point out, the actions of the RN or LPN are essentially those of a trained professional or technical employee. Those actions are taken primarily in the interest of the patient. The fact that they usually are consistent with the entrepreneurial goals of the employer does not detract from the professional or technical nature of the actions. By contrast, if the RN or LPN effectively recommends the discharge of an aide, the action is essentially that of a supervisor acting in the interest of the employer. The fact that it also inures to the benefit of patients (by removing an incompetent aide) does not detract from the supervisory nature of the action.

We find that the patient care analysis is soundly based on the statute, its legislative history, applicable policy considerations, and relevant precedent. The patient care analysis aids in resolving the compound problems of discerning statutory supervisory status of health care professionals who assign and direct other employees incidental to their treatment of patients.[12] As we have stated, it derives from the necessity of accommodating the legislative intent of allowing professional health care employees to be covered by the Act.

The Board has historically reached the same kind of accommodation outside the health care industry, in its ''leadman'' analysis. In other industries, employees who possess greater skills or experience than their fellow employees often give instructions and directions to other employees on the shop floor regarding what to do next, who is to work on which machine, and how to work more skillfully, efficiently, or safely. Such ''leadmen'' generally are not found to be statutory supervisors because they give such directions or instructions.[13] Our ''patient care'' analysis in the health care industry is not materially different from that used in the ''leadman'' cases, albeit we have usually employed different terminology in a setting in which the ''shop floor'' is a patient ward and the ''product'' is patient care rather than, say, ball bearings. Charge nurses in hospitals and nursing homes are, in our experience, on a par with ''leadmen'' in other industries; the kinds of

[12] Prior to the 1974 Health Care amendments, the Board had found supervisory status based on assignment and direction in *Avon Convalescent Center*, supra, and *Rockville Nursing Center*, 193 NLRB 959, 962 (1971). Charge nurses in these cases were found supervisory because they utilized their professional judgment in assigning and directing other employees. These cases are not consistent with the Board's current holdings which do not find supervisory status on this basis. Accordingly, these cases are overruled.

Although the patient care analysis is solidly based, our decisions have at times been imprecise in application. Thus, we have sometimes utilized terminology such as ''mere patient care'' (see, e.g., *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987)) or ''routine patient care'' (see, e.g., *Waverly-Cedar Falls Health Care*, supra)) or found that professional or technical judgment was exercised routinely in furtherance of patient care. (See, e.g., *Riverchase Health Care Center*, 304 NLRB 861 (1991); later case, 305 NLRB No. 141 (Dec. 26, 1991) (not reported in Board volumes), enf. denied Nos. 92-1068 & 92-1205 (4th Cir. 1992).) These decisions have not always clearly reflected that the patient care or professional/technical analysis is separate and apart from the analysis of whether the exercise of 2(11)-type authority is of a merely routine or clerical nature.

[13] In 1947, Congress endorsed the Board's distinction between ''straw bosses, leadmen, set-up men, and minor supervisory employees'' as opposed to individuals vested with ''genuine management prerogatives.'' S. Rep. No. 105 80th Cong., 1st Sess. 4 (1947), reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947 at 407, 410 (1985). Leadpersons have traditionally been found to be lacking in supervisory authority even though they direct employees' work, assign tasks, convey reports on employees' progress, and report rules infractions. See, e.g., *Higgins Industries*, 150 NLRB 106, 111–112 (1964) (four job leaders who report and correct defective work and warn and assist employees in correcting work are not supervisors); *Plastics Industrial Products*, 139 NLRB 1066, 1067–1068 (1962) (leadmen who assign operators to particular machines and report on progress of new operators are not supervisors); *Lindsay Newspapers*, 130 NLRB 680, 690–691 (1961), enfd. in relevant part 315 F.2d 709 (5th Cir. 1963) (man in charge of mailroom not supervisor although he could instruct employees to assist other employees; this did not constitute authority to transfer and assign employees); *Northern Chemical Industries*, 123 NLRB 77 (1959) (instrument leadman who looks after work of department and lays out work for other employees merely exercises judgment and direction of more experienced mechanic); *U.S. Gypsum Co.*, 118 NLRB 20, 29–30 (1957) (maintenance leaders who determine which jobs are to be performed and assign these jobs, insure safety rules are followed, and who appraise employees are not supervisors because their appraisals are subject to independent investigation and their direction and assignment derives from their greater skill leading to incidentally directing the movements and operations of less skilled employees); *U.S. Gypsum Co.*, 105 NLRB 931 (1953) (key operators not supervisors where recommendations regarding discipline are followed up by independent evaluation by admitted supervisors); *Pennsylvania Glass Sand Corp.*, 102 NLRB 559, 561 (1953) (gang leaders who recommend hiring and discharge not supervisors because their superior exercises independent judgment on these matters); *Gastonia Weaving Co.*, 91 NLRB 899, 900–901 (1950) (direction and assignment of other employees by transmitting instructions without exercise of independent judgment does not constitute supervisory authority). The patient care analysis merely incorporates these tenets in the health care setting.

assignments and direction they give to nurses aides and other employees are analogous to those given by ''leadmen'' outside the health care industry. For the same reasons we find, in other settings, that the authority to give such assignments and directions, without more, does not confer supervisory status, so also we find that the possession of that authority does not confer supervisory status in the health care industry.[14]

In *NLRB v. Yeshiva University*, 444 U.S. at 690 fn. 30, the Court referred to our decisions involving professional employees in a variety of contexts, including health care. The Court concluded that our decisions accurately reflected the intention of Congress. The Court specifically cited *Doctors' Hospital of Modesto*, 183 NLRB 950, 951–952, enfd. 489 F.2d 772 (9th Cir.), and noted that ''[I]n the health care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients, a test Congress expressly approved in 1974. S. Rep. No. 93-766, p. 6 (1974).''

While the Second,[15] Seventh,[16] Eighth,[17] Ninth,[18] and Eleventh[19] Circuit Courts of Appeals have agreed with the Board's application of the patient care analysis for assignment and direction of work, the Sixth Circuit has rejected this analysis, at least as applied by the Board.[20] The Fourth Circuit's position on this issue is unclear.[21]

In *Beverly California Corp. v. NLRB*, 970 F.2d 1548 (1992), the Sixth Circuit held that LPNs' direction of aides in patient care duties was sufficient to support a finding of 2(11) authority. The Employer has asked us to reconsider our decisions in light of Sixth Circuit decisions refusing to enforce our interpretation of the Act. During our extensive review of this area, we have been mindful that the facts in this case occurred within the geographic boundaries of the Sixth Circuit and that the Sixth Circuit has held that its interpretation of the Act—not the Board's interpretation of the Act—is based on the plain meaning of the statute.[22] However, the Sixth Circuit has also noted that there is some ''tension'' in the case law in this area.[23] Initially, we are mindful that the venue provisions of the NLRA subject Board decisions to potential review in circuits other than the circuit in which the unfair labor prac-

[14] Member Raudabaugh does not join in drawing the analogy between charge nurses and ''leadpersons.'' Charge nurses are professionals or technicals, and their use of independent judgment is inherent in their roles as professionals or technicals. The same cannot be said about ''leadpersons.'' They are not necessarily (or even usually) professionals or technicals. Accordingly, Member Raudabaugh would not draw the analogy, and would make no general pronouncements concerning ''leadpersons.''

[15] *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808 (1979), enfg. 246 NLRB 351 (1979).

[16] *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, enfg. 261 NLRB 160 (1982); *NLRB v. River Hills Nursing Home West*, 705 F.2d 1472 (1983), denying enf. 258 NLRB 425 (1981), as supplemented by 262 NLRB 1458 (1982); *Children's Habilitation Center v. NLRB*, 887 F.2d 130 (1989), enfg. 289 NLRB No. 109 (July 28, 1988) (not reported in Board volumes). The court has approved the Board's patient care analysis with certain qualifications. The court has weighed the charge nurse's duties in assigning and directing aides in light of the balance of power and conflict of interests between employees and employers.

[17] *Waverly-Cedar Falls Health Care Center v. NLRB*, 933 F.2d 626 (8th Cir. 1991), enfg. 298 NLRB 997 (1990).

[18] *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772 (1973), enfg. 193 NLRB 833 (1971); *NLRB v. St. Francis Hospital of Lynwood*, 601 F.2d 404 (1979), enfg. 232 NLRB 32 (1977).

[19] *NLRB v. Walker County Medical Center*, 722 F.2d 1535 (1984), enfg. 260 NLRB 862 (1982).

[20] In *NLRB v. Beacon Light Christian Nursing Home*, supra, the Sixth Circuit stated, ''patient care (or 'mere patient care,' in the Board's phraseology) is the business of a nursing home.'' See also *Beverly California Corp. v. NLRB*, supra; *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256 (1993); cert. granted No. 92-1964, Oct. 4, 1993. See 62 USLW 3244 (Oct. 5, 1993).

[21] *Methodist Home v. NLRB*, 596 F.2d 1173 (1979), enfg. in relevant part 234 NLRB 535 (1978); *NLRB v. St. Mary's Home*, 690 F.2d 1062 (1982), denying enf. in relevant part 258 NLRB 1024 (1981) (but agreeing with Board's patient care analysis); *Riverchase Health Care Center v. NLRB*, mem. Nos. 92-1068/1205 (Sept. 11, 1992), denying enf. 305 NLRB No. 141 (Dec. 26, 1991) (not reported in Board volumes).

[22] The court stated,

> It is perfectly obvious that the kind of judgment exercised by registered nurses in directing LPNs and nurse's aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not ''merely routine.'' As a matter of law, we have long since concluded, the fact that such judgment is exercised in the health care context makes no difference at all: ''Where nurses otherwise meet the statutory definition of supervisors, they are not disqualified because the activity they are supervising is patient care. There is no support in either the text of the Taft-Hartley Act or the legislative history of that Act for such a position. Upon our reading of the statute, we think that the law means exactly what it says, that individuals who 'promote, discharge, discipline, assign, and responsibly direct employees, or recommend such action' are supervisors, whether they are employed in the health care industry or any other industry.'' *Beacon Light*, 825 F.2d at 1079–80 (footnote and statutory citations omitted).

Beverly California Corp. v. NLRB, supra at 1553.

[23] ''The health care field is one in which the task of figuring out where the [dividing] line [between labor and management] runs has been particularly troublesome, and there is some tension within the caselaw in this area. See *Children's Habilitation Center v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989), contrasting *Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987); *NLRB v. Res-Care, Inc.*, supra and *NLRB v. River Hills Nursing Home West*, 705 F.2d 1472 (7th Cir. 1983).'' 970 F.2d at 1548–1549. Indeed, in *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256 (6th Cir. 1993), cert. granted Oct. 4, 1993 (No. 92-1964), 62 USLW 3244 (Oct. 5, 1993), the basis for granting certiorari was the conflict in the circuits regarding the Board's interpretation of Sec. 2(11) with regard to charge nurses. See 62 USLW 3244 (certiorari granted limited to question 1); and 62 USLW 3073 (Aug. 3, 1993) (Question 1: whether NLRB reasonably determined that nurse's direction of less skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a ''supervisor'' under Sec. 2(11).)

tices occur.[24] Accordingly, ''the Supreme Court, not [the] circuit or even all twelve circuits that have jurisdiction to review orders of the Labor Board, is the supreme arbiter of the meaning of the laws enforced by the Board. . . .'' *Nielson Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066 (7th Cir. 1988).

Substantively, our review of the Sixth Circuit's decisions indicates that the disagreement between our interpretation and the court's interpretation of the Act centers on whether assignment and direction given to aides regarding performance of patient care duties constitutes an indicium of supervisory status. The court has held that the independent professional judgment of nurses in directing and assigning aides to ensure quality patient care is, as a matter of law, in the interest of the employer.[25] Our decisions are clearly at odds with those of the court.[26] We are unable to conclude that simply because health care is the business of the employer all independent professional judgment of nurses in directing and assigning aides to patient care duties is automatically in the interest of the employer as contemplated by the statute.

Of course, the court's interpretation has a certain degree of literal logic to commend it. Basically, the court interprets ''in the interest of the employer'' to mean that all employees are acting in the employer's interest in producing the best product possible—sound patient care. Health care is the business of the employer and the nurses are engaged in assigning and directing employees in providing health care. However, if the court is correct that all independent professional judgment in responsibly directing and assigning aides constitutes delegated supervisory authority in the interest of the employer, all charge nurses in nursing homes are supervisors and the legislative intent to extend the Act's coverage to health care professionals is not accommodated.

In the charge nurse/nursing home context, perhaps the clearest articulation of the intent of the statutory phrase ''in the interest of the employer . . . to assign . . . or responsibly to direct'' was offered by the Seventh Circuit:

> The licensed practical nurses' greatest discretion is in deciding which nurse's aide shall do what task, but this discretion is exercised in accordance with a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests. It is no different from a doctor's telling his nurses which patients to provide what care to, which is not supervision under the statute.

[24] In *Arvin Industries*, 285 NLRB 753 (1987), we recognized that because the venue provisions of the Act are such that a Board order is potentially subject to review in circuits other than the one in which the case arises, the Act ''does not contemplate that the law of a single circuit would exclusively apply in any given case.'' 285 NLRB at 757. See also S. Estreicher & R. Revesz, *Nonacquiescence by Federal Administrative Adjudication*, 98 Yale L. J. 679, 709 (1989); Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 Geo. L. J. 1815 (1989).

[25] *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir.) (nurses who instructed aides were team leaders, assigned patients to aides, and were responsible for aides' work were supervisors because these duties involve patient care which is the business of a nursing home); *Beverly California Corp. v. NLRB*, 970 F.2d at 1552 (''the notion that direction given to subordinate personnel to ensure that the employer's nursing home customers receive 'quality care' somehow fails to qualify as direction given 'in the interest of the employer' makes very little sense to us.''); *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256, 1261 (1993), cert. granted Oct. 4, 1993 (No. 92–1964), 62 USLW 3244 (Oct. 5, 1993) (job duties in assigning aides to specific tasks and directing operation of aides as well as entire nursing home require the use of independent judgment and are taken in the interests of the employer).

[26] In addition to our substantive disagreement, we are also in disagreement with the Sixth Circuit regarding the appropriate placement of the burden of proof regarding supervisory status. We have held that the burden of proving supervisory status is on the party alleging that such status exists. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enfd. 703 F.2d 577 (9th Cir. 1983); *Tucson Gas & Electric Co.*, 241 NLRB 181, 181 and cases cited at fn. 3 (1979). The Sixth Circuit has held that in bargaining unit determinations the burden of proving that an employee is not a supervisor rests with the Board. *Health Care & Retirement Corp. v. NLRB*, 987 F.2d at 1260 (burden of proving employee status for bargaining unit determinations rested with the Board); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d at 1080 (Board always has burden of coming forward with evidence that employees are not supervisors in bargaining unit determinations).

We believe that the Sixth Circuit's allocation is unfeasible as a practical matter and, more importantly, it does not reflect the legislative intent of Congress. It is impractical to place the burden of proving employee status on the Board in representation cases because the Board is not a party to these nonadversary proceedings. The court's placement of the burden on the Board would require its intervention in the proceedings. Additionally, the court's articulation of the burden requires proof of a negative: proof that an employee does not possess 1 of 12 statutory indicia of supervisory status.

Moreover, our placement of the burden on the party making the assertion of supervisory status (the employer when it defends against an unfair labor practice complaint alleging unlawful discharge by claiming that an individual is a supervisor, or the General Counsel when he alleges an individual's supervisory status as part of his case, or the employer or the union in a representation proceeding where one or the other seeks to exclude individuals as supervisory) effectuates Congress' intention that the exclusion of supervisors be limited. The supervisory exclusion was intended to apply only to ''the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action'' and not to ''straw bosses, leadmen, set-up men, and other minor supervisory employees.'' S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947). Because the determination that an individual is a supervisor exempts the individual from the Act's protections, we have placed the burden appropriately on the party seeking to invoke the exclusion. Our placement of the burden of proof has been approved in other circuits. See, e.g., *Schnuck Markets v. NLRB*, 961 F.2d at 703; *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1445; cf. *Children's Habilitation Center v. NLRB*, 887 F.2d at 132 (noting that the ''burden of persuasion'' is on the employer respecting proof of the ratio that would exist between supervisory and employee ranks if the nurses in that case were supervisors).

NLRB v. Res-Care, Inc., 705 F.2d at 1468.[27]

In agreement with those courts which have accepted the patient care analysis, we find it useful to continue application of the analysis in analyzing assignment and direction indicia. We believe that continued application of the patient care analysis is true to the letter and spirit of the statute as informed by the legislative history and as interpreted in a substantial body of case authority.

Discipline

If an individual can discipline or effectively recommend discipline of other employees, the individual will be found supervisory.[28] In typical charge nurse cases, the individuals have authority to give employees oral warnings and write up the warnings on forms retained in the employee's personnel file. This authority typically extends beyond direct patient care matters. Usually, the director of nursing or some other administrator or manager independently investigates and decides what, if any, discipline is warranted. In many instances, there is no specified number of warnings that result in adverse action. Even in cases where personnel policies exist regarding a specified number of warnings, these policies are not always followed.

When confronted with these facts, we have held that the charge nurses are not supervisors because their warnings, either individually or in the aggregate, do not lead to personnel action; or, if they do, such action is not taken without independent investigation or review by others. Accordingly, their warnings are merely reportorial and not an indicium of supervisory authority.[29] We have employed the same analysis outside the health care industry.[30]

Similarly, many cases indicate that charge nurses have authority to suspend employees for flagrant violations such as drunkenness or abuse of patients.[31] The Board has not found this an indicium of supervisory status because no independent judgment is involved; the offenses are obvious violations of the employers' policies and speak for themselves. In addition, in many cases, the charge nurses do not typically recommend what, if any, further action should be taken, and even when they do make such recommendations, generally an independent investigation by acknowledged managers or administrators forms the basis for further disciplinary action.[32] The same analysis is used in nonhealth care settings.[33]

Our holdings regarding discipline have been upheld by the courts.[34] We will continue to utilize this framework for analysis. We have sometimes indicated that where a charge nurse's reportorial duties or suspensions for flagrant violations relate solely to patient care, no basis for finding supervisory status was present.[35] However, examination of these cases indicates that the real reason for failure to find supervisory status was not whether the warnings or suspensions related to patient care but whether they constituted effective recommendation of disciplinary action. This is in

[27] The court also stated,

> Supervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.

Children's Habilitation Center v. NLRB, 887 F.2d at 134.

[28] See, e.g., *Sun Refining & Marketing Co.*, 301 NLRB 642, 649–650 (1991); *JAMCO*, 294 NLRB 896, 899–900 (1989); *Wedgewood Health Care*, 267 NLRB 525, 525–526 (1983).

[29] Examples of such cases are *Passavant Health Center*, 284 NLRB 887, 889 (1987) (where warnings simply bring to employer's attention substandard performance without recommendations for further discipline and an admitted supervisor makes an independent evaluation of job performance, the role of delivering the warnings is reportorial); *Waverly-Cedar Falls Health Care*, 297 NLRB at 392 (''mere authority to issue oral and written warnings that do not alone affect job status does not constitute supervisory authority'').

[30] See, e.g., *RAHCO, Inc.*, 265 NLRB 235, 247–248 (1982) (record revealed employees were disciplined due to misconduct attributed to them by assistant line supervisor but in absence of effective recommendation from assistant line supervisor regarding discipline, his duties were mere monitoring which is not a manifestation of supervisory authority); *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234–1235 (1982) (leadmen not supervisors even though they report employee problems to employer); *Ahrens Aircraft, Inc.*, 259 NLRB 839, 842–843 (1981) (insufficient evidence that shop leaders who could correct work of other employees could reprimand or discipline employees to an extent which would meaningfully affect job status and therefore were not supervisors); see also *Knogo Corp.*, 265 NLRB 935, 935–936 (1982), enf. in relevant part 727 F.2d 55 (2d Cir. 1984) (leadperson who circulated antiunion petition was not agent of employer although she reported rule infractions or repeated incidents of poor performance by other employees where discipline was preceded by an independent investigation).

[31] See, e.g., *Riverchase Health Care Center*, 304 NLRB at 865 enf. denied sub nom. in technical 8(a)(5) case, 305 NLRB No. 141 (1991) (not included in Board volumes), *Riverchase Health Care Center v. NLRB*, 976 F.2d 725 (1992); *Phelps Community Medical Center*, 295 NLRB 486, 491–492 (1989).

[32] See, e.g., *Lakeview Health Center*, 308 NLRB 75, 77–78 (1992); *Riverchase Health Care Center*, supra at 864–865 (1991); *Waverly-Cedar Falls Health Care*, 297 NLRB at 392–393; *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989); *Passavant Health Center*, 284 NLRB at 888–891.

[33] See, e.g., *Quadrex Environmental Co.*, 308 NLRB 101, 102 (individual is not a supervisor although he has authority to order employees to leave worksite due to safety or work performance problems where management makes a subsequent independent investigation).

[34] See, e.g., *Waverly-Cedar Falls Health Care Center v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991); *NLRB v. Res-Care, Inc.*, 705 F.2d at 1467; *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1099–1100 (6th Cir. 1981).

[35] See, e.g., *Riverchase Health Care Center*, 304 NLRB at 864 (''In any event, the LPNs' concern in the disciplinary process does not extend beyond the realm of patient care.''); *Phelps Community Medical Center*, 295 NLRB 486, 491 (1990) (suspensions taken in connection with patient care do not illustrate supervisory status); *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1008 (1981) (''role in making anecdotal records . . . seems little more than a reporting function consistent with their professional responsibility to assure the proper and efficient treatment of patients.'').

fact the essential inquiry. We do not inquire whether, for instance in a manufacturing or construction setting, infractions relate to the substantive duties of the job, e.g., carelessness or damage in handling equipment and materials, or relate to action for disrespectful conduct toward a supervisor, failure to report for work, or similar violations of personnel rules. We believe it advisable to follow a similar analysis in the charge nurse area. Accordingly, in making future supervisory determinations, we have decided that whether a report or suspension relates to patient care or not, it will be examined only as to whether it constitutes effective recommendation of discipline or, in the case of suspension for flagrant violation, whether independent judgment was involved.

Evaluations of Staff

We have consistently found that charge nurses were supervisors when they performed evaluations of other employees and it was apparent that the evaluations led directly to personnel actions affecting the employees, such as merit raises.[36] By contrast, we have consistently declined to find supervisory status when charge nurses performed evaluations that did not, by themselves, affect other employees' job status and thus did not, by themselves, constitute effective recommendations for personnel actions.[37] Whether implicitly or explicitly stated in our decisions, it has always been our policy that for evaluations to constitute evidence of supervisory status they must *effectively* recommend personnel action. See *Bayou Manor Health Center*, 311 NLRB 955 (1993); *Health Care & Retirement Corp.*, supra.[38] The Board has used this approach outside the health care field as well.[39] The distinction between evaluations that constitute effective recommendations for personnel action and those that do not has been accepted by the courts.[40] We will continue to employ this analysis.

Secondary Indicia

Ratio

Following the 1974 amendments, initial decisions placed considerable emphasis on the ratio of supervisory to nonsupervisory personnel. For example, in *Brattleboro Memorial Hospital*, 226 NLRB 1036 (1976), after finding that head nurses were not supervisors because their functions were performed mainly in the ''exercise of professional judgment,'' the ratio factor was examined as a ''significant'' indicator. A finding that head nurses were supervisors ''would create a greater than 1-to-1 supervisory ratio . . . and the Board is inclined to place weight upon such an unrealistic ratio.'' 226 NLRB at 1038. This policy was echoed in *McAlester General Hospital*, supra, and *Wright Memorial Hospital*, supra. In *McAlester*, the ratio factor was emphasized in finding three individuals not to be supervisors: if they were held to be supervisors it ''would result in the nursing department being composed of 28 unit employees and 21 statutory supervisors. We are inclined to accord such an unrealistic ratio considerable weight.'' 233 NLRB at 589–590. In *Wright*, where the status of 15 RN charge nurses was litigated, we found them to be supervisors based on their authority to assign work and to discipline employees and noted that, ''[m]oreover, to find them not to be supervisors would result in an unrealis-

[36] See, e.g., *Health Care & Retirement Corp.*, 310 NLRB 1002, 1006–1007 (1993) (evaluations on scale of 1 to 5 resulted in annual raises directly correlated with the grades); *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (charge nurses effectively recommended merit raises as well as retention or dismissal); *Wedgewood Health Care*, 267 NLRB 525, 526 (1983) (charge nurse's evaluation could lead to probation); *Exeter Hospital*, 248 NLRB 377, 377–378 (1980) (charge nurses' evaluations regarding merit increases and promotions were not changed by administration even where there was disagreement).

[37] See, e.g., *Ohio Masonic Home*, 295 NLRB at 393 (charge nurses evaluated employees but made no recommendations regarding retention, discharge, or probation; no evidence that any employee was affected by evaluations); *Passavant Health Center*, 284 NLRB at 891 (charge nurses' evaluations contained no recommendations for specific personnel action; a poor evaluation led to independent investigation by administration); *Eventide South*, 239 NLRB 287, 288 (1987) (charge nurses evaluated employees but raises were based strictly on seniority; no evidence of any significance of evaluations); *McAlester General Hospital*, 233 NLRB 589, 591 (1977) (charge nurses evaluated employees but points determining merit raises allotted by personnel office—not by charge nurses; when a charge nurse recommended a raise for one employee who had too few points to qualify, the raise was denied and the charge nurse later reevaluated the employee).

[38] On occasion, the Board has found charge nurses to be supervisors, in part because they evaluated employees, without specifically finding that the evaluations affected employees' job status. See *Wright Memorial Hospital*, 255 NLRB 1319 (1980); *Pacific Convalescent Hospital*, 229 NLRB 507, 508–509 (1977). These inadvertent omissions did not constitute an attempt to alter the standard set forth above.

[39] See, e.g., *Plastics Industrial Products*, 139 NLRB 1066; *U.S. Gypsum*, 118 NLRB at 29–30 (1957).

[40] See *NLRB v. Res-Care, Inc.*, 705 F.2d at 1467 (evaluations which could not—or at least had not—led to termination or promotion did not constitute ''effective recommendation''); *NLRB v. River Hills Nursing Home West*, 705 F.2d 1472, 1474 (7th Cir. 1983) (evaluation could lead to termination and hence conferred supervisory status); *Beverly Enterprises v. NLRB*, 661 F.2d at 1100, 1102 fn. 3 (LPNs' evaluations were merely reportage, not effective recommendation of personnel action distinguishing *Doctors' Hospital*, 175 NLRB 354, and *Rosewood, Inc.*, 185 NLRB 193 (1970), as involving nurses whose evaluations effectively determined merit raises and retention); *Misericordia Hospital v. NLRB*, 623 F.2d 808, 817 (2d Cir. 1980) (head nurse did not effectively recommend personnel action where she evaluated employees but there was not evidence her recommendations were acted on and she was reprimanded for completing ''supervisor's recommendations'' part of the evaluation form); cf. *NLRB v. Beacon Light Nursing Home*, 825 F.2d 1076 (6th Cir.) (evaluations were serious attempt to determine employees' progress and constituted ''recommending action'' within the meaning of Sec. 2(11)).

tic ratio.'' 255 NLRB at 1320. See also *Northwoods Manor*, 260 NLRB 854 (1982), where the Board determined that the 27 charge nurses were supervisors because they had ''independent authority to discipline employees and effectively to recommend discharge'' and added ''[we] also find it significant that if charge nurses are not supervisors an unrealistic supervisor-to-employee ratio would exist at the Employer's facilities.'' 260 NLRB at 855.

Throughout our experience with charge nurse issues, we have recognized that ratio is a secondary indicator and cannot, in the absence of specific 2(11) indicia, provide a basis for a supervisory finding. In *Phelps Community Medical Center*, supra, after finding that the charge nurses possessed no primary indicia of supervisory authority, ratio was examined and found ''not a useful indicator'' because either way (1 to 3 if they are supervisors and 1 to 18 if they were not) was arguably unreasonable. The Board added, ''it would not change our conclusion because such a ratio is not a factor that the Act directs us to consider.'' 295 NLRB at 492 fn. 16; cf. *Waverly-Cedar Falls Health Care*, 297 NLRB at 393 (ratio not dispositive because arguably unreasonable in either case—1 to 15 or 1 to 4).

Highest Person in Charge

In a large percentage of 24-hour-per-day nursing home situations, charge nurses are typically the highest authority present on the late night and sometimes on the evening shift. We have frequently been urged to attach statutory significance to the lack of any higher authority. The results have varied. See, e.g., *McAlester General Hospital*, 233 NLRB 589, 589–590 (1977); *Wright Memorial Hospital*, supra.

In *Riverchase Health Care Center*, 304 NLRB 861, we noted the availability of procedural and instructional handbooks for the charge nurses to follow during those shifts in which they were ''in charge'' during night and weekend shifts. Based on this fact, we found unpersuasive the Employer's argument that its facility would be without supervision 76 percent of the time unless the nurses were deemed supervisors.[41] In *Phelps Community Medical Center*, supra, and *Waverly-Cedar Falls Health Care*, supra, the charge nurses were held not to exercise independent judgment during these shifts because they merely followed such procedures. See also *McCullough Environmental Services*, 306 NLRB 565, 566 (1992) (mere fact that lead operators are at times highest authority in plant does not in itself establish supervisory authority).

[41] In dissent, former Member Oviatt found that the nurses were supervisors because, in his view, they retained disciplinary authority over nurses aides and because they ''are the Employer's presence on the job for substantial periods of time.'' 304 NLRB at 867.

Secondary Indicia in the Courts

Where there is an issue of ratio or highest person in charge, the courts are not in complete agreement. The Fourth, Sixth, and Seventh Circuits accord considerable weight to these two factors. The Seventh Circuit has categorized ratio as one of the ''guiding lights'' in resolving the supervisory issue. *Children's Habilitation Center v. NLRB*, supra. Although the Seventh Circuit has endorsed the Board's patient care analysis, it will not enforce NLRB decisions if it finds that the ratio of supervisors to employees is too low. For example, in *NLRB v. River Hills Nursing Home West*, 705 F.2d at 1473–1474 the court found that the ratio of supervisors to employees would be about 1 to 27 under the Board's view. Given this ''extremely low ratio'' as well as the fact that the disputed RNs possessed authority to discharge, the court found that the charge nurses were supervisors. By contrast, in *NLRB v. Res-Care, Inc*., 705 F.2d 1461, 1468 (7th Cir.), the court upheld the Board's determination that the charge nurses were not supervisors in the absence of evidence that they possessed any primary indicia and where the ratio was 1 to 8 under the Board's view and 1 to 3 under the employer's view. Further, the court noted that being the highest ranking employee on the premises ''does not ipso facto make them supervisors.'' *Res-Care*, 705 F.2d at 1467.

The Sixth Circuit agrees with the Seventh Circuit on the ratio factor but not the highest person in charge factor. In *Beverly California Corp. v. NLRB*, 970 F.2d 1548, the court, after rejecting the Board's construction of Section 2(11) and finding that the nurses' direction of aides in providing patient care rendered them supervisors, added:

> On weekends and throughout every night, if the Board had its way, Richland Manor would be providing patient care with no on-site supervision at all. As we said of a similar situation in *Beacon Light*, 825 F.2d at 1080, ''[t]his is not a reasonable conclusion for a well-run nursing home, and there is no substantial evidence to support it.''

970 F.2d at 1556 fn. 9. The Sixth Circuit has also utilized ratio evidence, adopting the Seventh Circuit's ''warning flag'' approach. In *Beverly California*, the court held that ''[j]ust such a warning flag appears in the case at bar'' by the 1 to 31 ratio that would exist if the Board's view were to prevail. 970 F.2d at 1555. The court concluded ''[t]hat is simply no way to run a business of this type.'' 970 F.2d at 1556.

The Fourth Circuit has not discussed the role of ratio in the health care context but finds highest person in charge to be quite significant in determining supervisory status. In *NLRB v. St. Mary's Home*, 690 F.2d 1062, 1067–1068 (4th Cir. 1982), the court found, contrary to the Board, that Sheila Mitchell was a super-

visor based on the fact that she was the highest ranking official at the Home and was ''in charge'' during that time.

The Eighth Circuit held that the secondary indicia of highest person in charge does not confer supervisory status where routine procedures are set down to be followed and stipulated supervisors are on call. Moreover, the Eighth Circuit finds that ratio may not be dispositive of supervisory status. *Waverly-Cedar Falls Health Care Center v. NLRB*, 933 F.2d 626, 630. Cf. *Schnuck Markets v. NLRB*, 961 F.2d 700, 706 (8th Cir.) (courts are often aided by calculating mix of supervisory to nonsupervisory workers and examining whether employee is highest ranking on site).

Clarification

Secondary indicia have been used by the Board and courts in assessing the *likelihood* that certain individuals are supervisors, and we will continue to examine these factors when necessary to understand the workings of an employer's business.[42] However, the Act does not state or fairly imply that the highest ranking employee on a shift is necessarily a supervisor, nor does it indicate that a group of individuals must have supervisory status simply to avoid having a particular ratio of employees to supervisors that, in the estimation of some tribunal, is ''too high.''[43] The issue, then, is whether in exercising our judgment in interpreting the Act, we may properly accord dispositive weight to such secondary indicia. We think not. As we have held in the past, only the existence of at least one of the enumerated statutory indicia can confer supervisory status.[44] Thus, unless an individual possesses one or more of the statutory indicia of supervisory status, neither the ratio of supervisors to employees nor the fact that she may be the sole person in charge at times (nor both together) can transform her into a statutory supervisor.[45]

Having reviewed and clarified the applicable legal principles, we will now apply them to the facts of this case.

Procedural History

On August 31, 1992, District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO, Petitioner, filed a petition seeking to represent service and maintenance employees at the Northcrest Nursing Home located in Napolean, Ohio. The unit sought was as follows:

> All full time and part time service and maintenance employees, including LPN's [sic], nurses aides, certified nurses aides, housekeeping employees, laundry employees, dietary employees, maintenance employees, activity aides, restoritive [sic] aides [excluding] clericals, professional employees, supervisors and guards as defined in the Act.

Following a hearing held in September 1992, the Regional Director issued his Decision and Direction of Election on October 15, 1992, finding that licensed practical nurses (LPNs), all of whom serve as charge nurses, were not supervisors and, in addition, shared a community of interest with the other service and maintenance employees.

On October 29, 1992, the Employer sought review claiming that the LPN charge nurses were supervisors, that the LPN charge nurses did not share a community of interest with other service and maintenance employees, and, further, requesting that the Board reconsider its policy regarding supervision of patient care in light of Sixth Circuit precedent rejecting this analysis.[46] On November 20, 1992, we granted review solely on the issue of whether LPNs who function as charge nurses are supervisors. The Petitioner filed a brief on review on January 8, 1993.

Factual Overview

The Employer operates a 100-bed skilled and intermediate care, short- and long-term rehabilitation nursing home in Napolean, Ohio. The facility has two patient wings connected by a corridor which serves as a common area containing laundry, kitchen, dining room, and breakroom facilities. The ''front'' wing is a

[42] In this regard, we recognize that secondary indicia can shed light on whether primary indicia exist. For example, if a charge nurse is the only person in charge at night, and there is no practice of checking with others by phone or otherwise, this may suggest that employment decisions made by the charge nurse involve the use of independent judgment.

[43] To be sure, it may be argued that these factors are fairly derived from legislative history. Perhaps the strongest argument regarding a statutory basis for utilizing the ratio factor was set forth by Judge Posner in *NLRB v. Res-Care*, supra. Judge Posner concluded on examination of the legislative history of Sec. 2(11) that statutory supervisors must be excluded from coverage by the Act in order to avoid conflicts of interest and to maintain a fair balance of power. In determining the balance of power, Judge Posner examined the ratio of supervisors to employees. 705 F.2d at 1468.

[44] See, e.g., *RAHCO, Inc*., 265 NLRB at 248.

[45] Many, if not most of these charge nurse cases involve nursing homes where at night at least, most of the geriatric patients are asleep and staffs are reduced. It is at this time that charge nurses are frequently the sole person in charge of the facility. As a practical matter, few personnel problems appear to arise at this time of night that could not, and do not, wait until the daytime for resolution. Supervisory authority is not required to deal with any medical emergencies which may arise. Although the Sixth Circuit has stated that the absence of a 2(11) supervisor from a facility during these shifts is ''no way to run a nursing home,'' we do not think it is for us to instruct employers on how their business is to be run.

[46] See, e.g., *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256, cert. granted No. 92–1964 (Oct. 4, 1993); *Beverly California Corp. v. NLRB*, 970 F.2d 1548 (1992); *NLRB v. Christian Light Nursing Home*, 825 F.2d 1076 (1987); see also *Beverly Enterprises v. NLRB*, 661 F.2d 1095, and 727 F.2d 591 (1984).

skilled, Medicare-certified unit and is occupied by patients who require the most attention. At the time of the hearing, 51 patients resided in this wing. The Medicare certification requires that an RN serve as charge nurse at least 8 hours during the day shift. The ''north'' wing is an intermediate care unit which housed 45 residents at the time of the hearing.

By stipulation, the parties agreed that Administrator Lynn Buckley, Director of Nursing Diana Schumaker, Assistant Director of Nursing Margie Davis, and Director of Staff Development Amy Decker, as well as the housekeeping and laundry, dietary, and maintenance supervisors, were ineligible to vote. The parties also stipulated that the six RNs, all of whom serve at times as charge nurses, were ineligible to vote. The supervisory status of 11 LPNs, all of whom serve at times as charge nurses, was litigated.

The 24-hour operation consists of three shifts. All nurses report directly to the director of nursing. Staffing schedules are created by the director of nursing for nurses (''nurses'' including both LPNs and RNs) and by the director of staff development for the 51 nurses aides. Each schedule covers a 2-week, 14-day period. For each day, the schedule reflects whether the employee is to work and, if scheduled to work, the wing, shift, and, as to aides, the patient group to which the employee is assigned. The schedule for nurses also reflects whether the nurse is to act as charge nurse or treatment nurse.

On the day shift (7 a.m. to 3 p.m.), two charge nurses, one for each wing, and one treatment nurse for the skilled-care wing plus the four administrators are present. Eleven aides (six on the skilled wing, five on the unskilled wing) work this shift. Two of these aides may be restorative aides. On the evening shift (3 to 11 p.m.), 2 charge nurses are present—again, 1 for each wing—as are 10 aides (split 5 and 5). On the night shift (11 p.m. to 7 a.m.), there are two charge nurses, one for each wing, and five aides (split three on the skilled and two, unskilled). There is not usually a treatment nurse on the second or third shift.

In addition to the nursing department, the Employer's operation includes a maintenance department, dietary department, and housekeeping and laundry departments. The parties agreed that the heads of these departments are ineligible to vote. The record does not contain specific numbers of employees included in these departments. However, the petition states that there are 85 employees in the petitioned-for unit. Excluding the 11 LPNs and 51 aides, it would appear that there are approximately 23 employees in the 3 other departments.

The Employer trains its aides in order to comply with state certification requirements. The director of staff development provides a 2-week course for newly hired aides in proper bathing, ambulation, range of motion, mouth care, hair care, toileting, incontinence care, and turning of patients. Aides are also trained in use of stethoscope, thermometer, and blood pressure gauge. On completion of the training, the aide is given an orientation period. Thereafter, the aide is assigned on the schedule with other aides to a group of residents. Generally, the aides perform such duties as getting the residents out of bed, changing bed linens, dressing patients, brushing/washing hair and teeth, bathing, turning, changing diapers, helping patient to toilet, providing walkers, feeding patients, and other similar tasks.

Charge nurses may be RNs or LPNs. The record reflects no distinction in the patient-care duties performed whether an RN or LPN acts as a charge nurse. LPNs attend 1 year of formal classroom study of anatomy and physiology as well as clinical study of the use of instruments such as the stethoscope, blood pressure instrument, thermometer, tracheal tube care including suctioning and cleaning, food pump, blood sugar tests called ''accu-checks,'' mist machines, oxygen concentrators, and oxygen tanks. On completion of course work, the student must successfully complete state licensing procedures in order to become a certified LPN. Following certification, the LPN must comply with continuing education requirements. The Employer provides these continuing education requirements for its LPNs.

RNs attend either a 2- or 4-year program and receive their degree. Thereafter, the RN must complete the state certification process. The record reflects that RNs are trained in the same duties as LPNs. In the nursing home context, the record indicates that the only thing an RN can do which an LPN cannot do is start and monitor intravenous treatment and administer medications through intravenous procedure. However, LPNs monitor intravenous sites for infection and sometimes remove the intravenous equipment. The record indicates that there were either one or no patients receiving intravenous treatment at the time of the hearing.

The normal shift work of a charge nurse begins with receiving a ''report'' from the prior charge nurse on that wing. This means that the charge nurse about to leave the wing tells the charge nurse reporting in for work about anything which has occurred on the prior shift. This might include a patient's falling, deteriorating patient conditions, general conditions of patients—whether they had a good day or a bad day—and any special needs or treatments required. The departing charge nurse also tells the incoming charge nurse which aides have ''called off'' and whether the departing charge nurse has been able to find any replacements for these aides. When the shift begins, the charge nurse gives a ''report'' to the aides assigned to her wing and shift, letting them know anything relevant to their group of residents. The charge nurse

may reassign aides as needed to handle staff shortages or emergency situations. This reassignment is for the immediate shift only. The charge nurse cannot make permanent changes to the schedule.

The charge nurse makes several ''med passes'' throughout the course of the shift. A ''med pass'' refers to dispensing prescription and nonprescription medicines to residents according to a schedule determined by the residents' physicians. A ''med pass'' may occupy in excess of an hour's time.

Each charge nurse spends a great deal of time at the nurses station charting each patient's treatment and answering telephone calls from doctors and family. Aides are not allowed to answer or use the telephone. The charge nurse also answers patient call lights which may indicate that an aide needs assistance with restraint of a patient or that a patient wants pain medication etc. As the charge nurse goes from room to room, if there are tasks which need to be performed or were neglected, she tells the appropriate aide to complete or perform the task. Charge nurses also perform patient treatments if no treatment nurse is assigned to their shift.

The charge nurse may complete a form called either ''Associate Memorandum'' or ''Employee Memorandum'' which sets forth specific actions of an aide in violation of the Employer's policies. The charge nurse also fills in as an aide from time to time performing such typical aide duties as handing out glasses of ice water or cleaning bedpans. This occurs especially when the staff is short-handed. The charge nurse receives calls from aides scheduled to work on the following shift and attempts to find replacement employees. When the next charge nurse arrives, the outgoing charge nurse ''gives report'' and the entire scenario recurs.

RNs and LPNs may also serve as treatment nurse. The schedule usually provides for a charge nurse and treatment nurse on the first shift in the front, skilled-care wing. Sometimes the schedule provides for both a charge nurse and a treatment nurse on the second shift in the front wing. The schedule never requires both a charge nurse and a treatment nurse on the front wing third shift or on any shift on the north, intermediate-care wing. Duties of a treatment nurse include ''trach'' care, filling tube feeders, changing dressings, and irrigations. If there is no treatment nurse, the charge nurse performs all duties.

With these facts in mind, we will now examine the parties' contentions with respect to specific indicia of supervisory authority. The main contentions focus on assignment and direction, discipline, and evaluation.

Assignment and Direction

Facts

The director of staff development compiles a biweekly schedule for all aides. The 51 aides are scheduled during the 14-day period by wing, shift, and resident group. Break- and lunchtimes by resident group assignment are set forth in a manual at the nurses station. Charge nurses are not consulted regarding scheduling and may not alter the scheduled days of work or shift assignments. Wing assignments may be altered by charge nurses on a temporary basis due to personnel shortages. However, such reassignment is temporary, lasting only for a particular shift. To alter one's scheduled day of work or shift assignment, it is necessary to make out a ''swap sheet'' and give it to the director of staff development. In order to schedule vacations, a vacation request form must be completed and given to the director of staff development. Leaves of absence are similarly routed.

When an aide cannot be present as scheduled, the aide must call the charge nurse on the prior shift. The charge nurse then attempts to find a replacement employee by looking at the schedule to see which employees are not scheduled to work. If, after calling these employees, she finds that none are available, she then asks employees currently on duty to stay an extra shift. If still in need of replacements, she may then call employees who are scheduled for the shift following. This procedure is uniformly followed by the charge nurses. They cannot force an employee to report as a replacement. When making these calls, they are unaware whether this may require payment of overtime to the replacement employee.

If sufficient replacements are not located, the next shift works short-handed. The charge nurse on the next shift may adjust aides during the shift by assigning them from one location to another for that particular shift. The charge nurse may also change the wing assignment, if necessary, to cover the floor during a shift.[47]

Further, during the course of a shift—whether short-handed or not—the charge nurse may alter aide assignments. These alterations are temporary and do not affect the employee's schedule or assignment for the next day worked. Charge nurses make these assignments using their own judgment. They do not need prior approval from the Employer to make these assignments.

The charge nurse does not assign break- or lunchtimes. These times are set forth by group assign-

[47] One charge nurse stated that she might move an aide on a temporary basis if the aide was not capable of performing assigned duties.

ment and are predetermined by the director of staff development. In fact, it appears that the aides take their breaks and lunches as their work is completed rather than as scheduled, letting the charge nurse know when they are leaving.

If an aide wants to leave the premises during her/his shift for personal reasons, such as illness or family needs, the testimony is in conflict regarding the charge nurse's role. Petitioner's witnesses stated that the charge nurse would simply make out a leave slip to pass on to the director of nursing while the Employer's witnesses said that the charge nurse would exercise her/his own judgment in determining whether to allow the employee to leave.

In addition to staffing duties, the charge nurse monitors the work throughout each shift to ensure adequate patient care. It is unnecessary for the charge nurse to direct every aspect of the aides' work. Aides have been trained and know their duties generally. Inexperienced aides work with an experienced aide, who receives added compensation for serving as a mentor to the inexperienced aide. However, if a charge nurse sees that a patient needs care, the charge nurse tells the aide what to do. For instance, a charge nurse may tell an aide to change a patient or turn a patient. The charge nurse does not need prior employer approval to give this direction. Charge nurses use their own judgment in this regard. Aides know that charge nurses can direct their performance of duties, that they are under an obligation to follow these directions, and that if they do not they may be subject to disciplinary action.

Normally, the aides know which patients to care for by consulting the director of staff development's biweekly schedules which set forth a number for each shift that each aide works. The number corresponds to a patient group. However, the charge nurse may assign an aide to another patient group when the need arises or direct the aide to perform other tasks as time allows. Reassignment to another patient group is temporary and does not extend beyond the shift. Examples of other tasks which a charge nurse might direct include cleaning closets or drawers and performing extra ambulation or extra turning of patients. Charge nurses do not need prior approval to direct aides to perform these other tasks. They use their own judgment in directing these other tasks.

When a patient requires special care and when a new patient is received, the charge nurse tells the aides about specific requirements. For instance, if a patient has injured a leg or foot, the charge nurse will tell the aide to make sure the patient does not put weight on that foot or leg.

Indirect evidence regarding responsible direction of work included testimony that when the director of staff development hires and orients new aides, she tells them that the charge nurse will be their direct supervisor. The director of staff development was told when she was initially hired as an LPN charge nurse that she was the direct supervisor of aides and she still feels that she is their direct supervisor when she substitutes as an LPN charge nurse.

The Employer's job title for LPN charge nurse is ''Licensed Nurse Supervisor.'' However, the name tags provided by the Employer for LPN charge nurses to wear on their uniforms have the employee's name followed by ''LPN, Charge Nurse.'' A placard at each nurses station states ''Nursing Supervisor on Duty'' and has a space for the charge nurse to insert her name. Some charge nurses use this placard and others do not. The job description, which is signed by each LPN charge nurse on hire, contains the following definition:

> The Licensed Nurse Supervisor is responsible for adhering to the Nursing Services policies and procedures, delivering and supervising nursing care, developing the nurse assistant staff, and other tasks leading to providing quality patient care at least cost.

It also lists duties including ''Deliver and supervise quality patient care'' and states that the purpose of the job is ''to assist in the coordination of supervisory tasks and patient care services as well as to provide direct patient care.'' The document additionally states, ''you must be willing to participate in self-improvement programs in the area of patient care skills and supervision.'' The document contains numerous other statements regarding solving employee problems, providing adequate staffing, and assisting in planning the departmental budget. Charge nurses testified that they had not assisted in planning any budget. Charge nurses testified that they did assist in solving employee problems regarding care of patients.

Notes from a 1990 ''in-service'' meeting, attended by second-shift aides and their charge nurses, reflect an item which stated, ''Your charge nurse is your 'Boss.' You are to do as you are told. Talking back &/or arguing are insubordination.'' No witness testified to being at this meeting or was able to state that this item was discussed.

When asked for estimates of percentages of time a charge nurse spends in direct patient care, the Petitioner's witnesses estimated about 90 percent while the Employer's witnesses estimated 30 to 50 percent. The disagreement in estimates centered on whether the charting duties of the charge nurse were to be categorized as ''direct patient care.'' Charting is performed at the central nursing station. Petitioner's witnesses felt that it was direct patient care while Employer witnesses did not think that it was.

Regional Director's Finding

The Regional Director found that the aides' tasks were routine and required little direction other than instructions regarding special or new patients. Moreover, noting that the charge nurses were responsible for directing patient care, the Regional Director stated:

> The Board has consistently refused to confer supervisory status on health care employees whose instructions to other employees are merely in furtherance of patient care. *Beverly Enterprises d/b/a Beverly Manor and Convalescent Centers*, 275 NLRB 943, 946 (1985) and cases cited therein. The Board has found charge nurses not to be supervisors within the meaning of Section 2(11) of the Act even where there is evidence that they direct employees. . . . In these circumstances, the Board has concentrated on whether the authority was exercised in the interest of the employer or in furtherance of patient care. E.g., *Beverly Manor*, supra; *Beverly Enterprise, Alabama, Inc., d/b/a Riverchase Health Care Center*, 304 NLRB 861 (1991); *The Ohio Masonic Home, Inc.*, supra; *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390 (1989).

Specifically, the Regional Director found that in directing the aides' work the LPNs exercised professional judgment rather than traditional supervisory judgment on behalf of the Employer. Moreover, the Regional Director held that by calling in aides as replacement employees the LPN charge nurses performed only a routine task in order to keep the facility fully staffed.

Contentions of the Parties

The Employer argues that the Regional Director wholly ignored the evidence of charge nurse authority to assign various tasks to aides. In support of this argument, the Employer notes that the Regional Director failed to mention a particular exhibit which stated, ''Your charge nurse is your boss. You are to do as you are told. Talking back or arguing are insubordination.'' The Employer contends that the LPNs have absolute discretion over who gets called in to replace an absent employee and that this gives LPNs the ''untrammeled'' authority to authorize overtime. The Employer asserts that the Regional Director overlooked evidence which indicates that charge nurses have the authority to approve or disapprove an aide's request to leave early. Finally, the Employer argues that the Regional Director wholly ignored the evidence regarding charge nurses' authority to temporarily change wing assignments and to transfer employees from one job assignment to another and from one location to another without prior approval.[48]

The Petitioner argues that any authority charge nurses have to assign and direct is exercised in a routine or clerical manner requiring no use of independent judgment. The Petitioner also asserts that LPNs direct aides and assign tasks in accord with professional norms, in furtherance of patient care, and in a manner unrelated to the Employer's personnel interests. The Petitioner notes that LPNs do not have authority to require employees to report as replacements. Petitioner also argues that no independent judgment is exercised in calling employees because an order has already been worked out in advance. Accordingly, the Petitioner categorizes this duty as routine or clerical. Finally, the Petitioner notes that the Regional Director did not ignore the Employer's evidence regarding approval or disapproval of requests to leave early. Rather, the director of staff development testified that if a charge nurse denied such a request, the employee would probably come to her for approval. Accordingly, the Petitioner claims there is no effective recommendation regarding assignment.

Analysis

We affirm the Regional Director's conclusion for the following reasons. The evidence reflects that charge nurses sometimes use independent judgment in assignment and direction of aides. Charge nurses assign aides to specific tasks, temporarily reassign aides—sometimes changing wing assignments—to meet staff shortages or emergency situations, and inform aides about special needs of patients. During each shift, the charge nurse monitors patient care. When a charge nurse sees that a task needs to be performed, she typically instructs the responsible aide.

Charge nurses may move aides from one job to another or from one location to another without prior approval. In fact, charge nurses give directions and assignments without prior approval from the Employer, using their own judgment, to the extent it is required, in directing these tasks. All of these instances of as-

[48] The Employer notes that the Regional Director's decision states that LPNs do not have authority to change the aides' wing assignments. The Employer asserts that this statement is directly contradicted by testimony at the hearing. However, reading the Regional Director's statement in context, ''LPNs do not have the authority to change the aides' scheduled days of work, shifts, or wing assignment,'' it is clear that the Regional Director was discussing only ability to alter scheduled wing assignments. The Regional Director's next sentence confirms this: ''The LPNs can make temporary changes in an aide's location and job assignment for that day without prior approval, but permanent changes must be made by Staff Development Director Amy Decker.'' The Regional Director meant that LPNs do not have the authority to permanently change wing assignments—a proposition with which the Employer agrees. However, the LPNs do possess the authority to temporarily change wing assignments.

signment and direction may require the use of independent judgment on the part of the charge nurse. They are not always routine matters. We move then to the next part of the analysis: is the independent judgment exercised incidental to professional or technical judgment or is this independent judgment exercised for disciplinary or other matters, i.e., in addition to treatment of patients. We find that the assignment and direction are for the most part given as an extension of the nurses' professional or technical judgment in the interest of providing sound patient care. Consistent with the Committee Reports accompanying the 1974 Health Care Amendments, we find that the direction given by the charge nurses in this case is incidental to their treatment of patients as technical or professional employees, and ''thus is not the exercise of supervisory authority in the interest of the employer.''[49] Moreover, we note that the assignment and direction is aimed primarily at providing care in the patient's interest and does not take into consideration the managerial judgment of what may be in the Employer's best financial or profit-maximizing interest.[50]

As to the Employer's reliance on the fact that aides are told in orientation that they must follow the nurses' directives, we find this statement insufficient to confer supervisory authority because such statements do not ipso facto confer supervisory status and, in any event, require an analysis of whether actual directives are in the interest of the employer, as we use that term. Our analysis above has concluded to the contrary. The Employer's reference to a document in its files from 1990 which indicates an intent to discuss the fact that charge nurses are aides' ''bosses'' and that aides are to do as they are told, lacks relevance to this proceeding in the absence of independent, nonhearsay evidence that such a meeting actually occurred. Moreover, even were there evidence to show that these sentiments had been communicated, we find such statements insufficient to confer supervisory status because such direction must be in the interest of the employer.

We have also examined the charge nurses' duties in finding replacement employees when scheduled employees notify them that they will not be reporting as scheduled. The facts, which are detailed above, indicate that a standard procedure is followed. The procedure may have evolved, as the Employer argues, from common sense. In any event, we find that utilizing the procedure is routine and does not require the exercise of independent judgment on the part of the charge nurses. Accordingly, although this duty may constitute assignment on behalf of the employer, it is not indicative of supervisory authority because it is exercised in a routine or clerical manner. Similarly, the record indicates that at least one charge nurse may sometimes exercise discretion in determining whether employees may leave work early.[51] Other charge nurses testified to the contrary and we are unable to find on this record that the evidence establishes the charge nurses are vested with the authority to grant or deny employees the right to leave for illness or other reasons. Moreover, even assuming such discretion existed, this is insufficient to confer supervisory status. *Kent Products*, 289 NLRB 824 (1988) (individual who had authority to allow employees to leave work early due to illness or medical appointments but who could not authorize days off was not supervisor).[52] It would seem self-evident that a sick employee cannot continue to work, especially in a health care facility, and acknowledgment of this fact by the charge nurse does not require sufficient independent judgment to constitute that person a supervisor.[53]

Discipline

Facts

The Employer has a disciplinary policy which states that after three warnings within a 1-year period, an employee may be terminated. Charge nurses complete forms called either ''Employee Memoranda'' or ''Associate Memoranda'' which are commonly referred to as ''writeups.'' Typically, the charge nurse checks either oral or written warning on the form although other boxes for suspension and termination are also on the form. The charge nurse completes the form by stating what action the aide has taken in violation of company policies and procedures. Typically, the charge nurse signs the form in the place denoted ''Supervisor.''

[49] S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974).

[50] Of course, as we have pointed out before, we recognize that one of the Employer's interests is providing patient care. In this respect the interest of the patient and one of the interests of the Employer coincide. However, we require something more in order to give meaning to the phrase ''in the interest of the employer.'' See fn. 27, supra.

[51] The Employer relies on the testimony of Director of Staff Development Amy Decker who testified that charge nurses could grant or deny an aide's request to leave early and if the request was denied the aide could appeal to her. LPN Linda Rosebrock stated she could make a judgment call if an employee wanted to leave. LPN Kelly Spangler testified that she did not have authority to stop an employee from leaving but might write up the employee depending on the reason given for wanting to leave. LPN Darlene Babcock stated she did not think she had authority to grant permission to leave. She stated that in one instance an aide left to go to the emergency room and in another instance an aide left due to illness. She simply filled out a call slip but did not grant permission.

[52] The Employer also argues that Charge Nurse Babcock testified that she ''wrote up'' an employee for leaving her work area. The Employer implies that this evidence bolsters its argument that charge nurses have discretion to allow employees to leave work for illness etc. The record reveals that Babcock was referring to an instance when an aide was out of her assigned area. This testimony is relevant in the disciplinary discussion. However, we fail to see its relevance in the area of assignment and direction.

[53] Cf. *NLRB v. Res-Care*, supra, 705 F.2d at 1467–1468.

This is the only place to sign. The charge nurse gives the form to the aide who reads it and writes his/her version of the event, signs the form, and retains a copy. The original is forwarded to the director of nursing.

Charge nurses do not have access to employee personnel files and do not know how many prior warnings might be in any file. Once the charge nurse sends the writeup to the director of nursing, the charge nurse is not contacted further by the director of nursing and is not informed about whether any action thereafter occurs.

Numerous writeups were produced. In all cases, the charge nurse signed in the place for ''supervisor'' and marked either oral or written warning. Reasons for the writeups were: swearing/yelling in patient's room or hallway; clocking in or out early or late; answering telephone without permission; leaving for break without telling charge nurse; failure to properly record intakes (food consumed) and outputs (eliminations); failure to restrain patient in wheelchair causing patient to fall; leaving patient in urine-soaked bed after being told to change bed; failure to change patient's diaper; failure to wash all patients before taking break; failure to answer call light; and failure to wear gait belt.

Examination of these documents reveals that at least two employees received three writeups within 1 year and continued to work. Specifically, one of these employees received writeups dated April 22 and June 4 and 8, 1990, and later received further writeups on September 24, 1990, and March 1 and April 5, 1991. Another employee received writeups dated January 3, 1991, February 19, 24, and 25, 1991, and was still employed on June 10, 1991, to receive a further writeup. The record does not contain any evidence regarding whether these or other employees were suspended or discharged as a result of the writeups.

Charge nurses may send an employee home for drunkenness or patient abuse. The director of nursing follows this with an independent investigation. The record revealed two instances in which a charge nurse wrote up an employee for abuse and recommended discharge. After an independent investigation in both cases, one employee was discharged and the other was not discharged due to lack of evidence and credibility conflicts between the employee and the charge nurse. All discharges have to be centrally cleared through the area manager of corporate human relations at headquarters.

The parties agreed that charge nurses do not have any authority to hire, fire, alter disciplinary action, suspend, or discharge.

Regional Director's Findings

The Regional Director found the writeups were reportorial only. He noted that there was no evidence indicating that the writeups had ever played a part in the imposition of discipline or whether they even carried any weight in a disciplinary decision. Moreover, the Regional Director indicated that his decision was based on the fact that an independent investigation was conducted before any decision regarding discipline was made. As to one instance in which Director of Staff Development Decker testified that she recommended discharge of an aide for patient abuse (4 years before the hearing at a time when she was a charge nurse), the Regional Director noted that no evidence was produced indicating whether the employee was discharged due to Decker's recommendation. The Regional Director also stated that lack of access to personnel files by the charge nurses was indicative of lack of disciplinary authority.

Contentions of the Parties

The Employer argues that the writeups themselves are a form of discipline and, in any event, under the Employer's progressive disciplinary system, the writeups can result in adverse action being taken against the employee. Citing *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir.); *Wedgewood Health Care*, 267 NLRB 525 (1983); *Northwood Manor*, 260 NLRB 854; and *Wright Memorial Hospital*, 255 NLRB 1319, the Employer states that this constitutes the exercise of supervisory authority. Moreover, the Employer faults the Regional Director for characterizing all of the writeups as related to patient care. In the Employer's view, many of the writeups were for nonpatient care infractions.

Relying on *Children's Habilitation Center v. NLRB*, 887 F.2d 130 (7th Cir.), the Petitioner argues that completion of written and oral warnings which are placed in personnel files, without more, does not establish supervisory authority where it is clear that charge nurses have no responsibility for recommending discipline and disciplinary decisions are made by conceded supervisors. Moreover, the Petitioner notes that the writeups do not lead to automatic effects on job status or tenure. The Petitioner also notes that when an independent investigation is made by admitted supervisors prior to suspension or discharge, no supervisory status exists.

Analysis

We agree with the Regional Director's conclusion regarding discipline. The Employer has failed to show that it has a progressive disciplinary system. The only specific examples on the record indicate that receipt of three writeups does not lead to any form of discipline. As to the Employer's argument that the writeups themselves are a form of discipline, we disagree. The record before us indicates that these writeups are merely reports and that the LPN charge nurses are not vest-

ed with any authority to responsibly recommend disciplinary action. If they were vested with such authority, no independent investigation or weighing of LPN credibility versus aide credibility would be necessary.[54] We disavow the Regional Director's reliance on the patient care nature of the writeups as a basis for finding LPNs do not possess supervisory authority.[55]

Evaluation

Facts

Charge nurse witnesses generally stated that they did not have any input into evaluations except for one instance in which Charge Nurse Spangler was asked to complete two evaluation forms. She completed the forms and returned them but was not present at any evaluation and has not been asked to complete other evaluations since that time, about a year before the hearing. Another charge nurse stated generally that she had been asked for input on evaluations. No specific information was elicited. The director of staff development testified that she informally consults with charge nurses about aides before completing the aides' evaluations. However, she does not ask for recommendations about job tenure. In any event, evaluations have no impact on wage increases. Wage increases are determined at corporate headquarters without regard to evaluations.

Regional Director's Findings

The Regional Director found that there was no evidence indicating that the director of staff development's informal questioning of charge nurses had any impact on job status. Similarly, there was no evidence indicating that Spangler's evaluations had any impact on job status. Further, the Regional Director noted a lack of any evidence that Spangler's evaluations or Decker's informal questioning involved any type of recommendation about promotions, wage increases, discipline, or retention.

Contentions of the Parties

The Employer contends that the Regional Director ignored its proffered evidence in concluding that the charge nurses do not affect employee job status in completing or assisting in the completion of employee evaluations. The Petitioner argues that the Regional Director's decision is fully in accord with precedent and does not ignore the Employer's evidence.

Analysis

On the record before us we are satisfied that the Regional Director's findings regarding evaluations are fully supported by the evidence. There is simply no evidence that charge nurses have authority to effectively recommend that an employee's job status be altered through reward—the statutory indicia which is associated with the evaluation process.[56] The fact that the charge nurses may be asked questions by the director of staff development falls short of constituting evidence that charge nurses effectively make recommendations affecting job status.

Secondary Indicia

Ratio

Facts

At the time of the hearing, within the nursing department 4 nursing administrators, 6 RNs, all of whom functioned at times as charge nurses, and 11 LPNs, all serving as charge nurses when assigned, worked with a total of 51 nurses aides.[57] The parties stipulated that the administrators and RNs are ''ineligible to vote'' and, as to the RNs, the Employer urges that we treat this as a stipulation of supervisory status. The parties agree that the administrators are supervisors. The first shift is staffed with the 4 administrators, 2 charge nurses (usually 1 RN and 1 LPN), 1 treatment nurse (an RN or LPN), and 13 aides. Two RN/LPN charge nurses are present on the second shift with ten aides. The third shift is significantly reduced: two LPN charge nurses work with five aides.

Regional Director's Decision

Examining the nursing department ratio, the Regional Director noted that these figures produced a ratio of 1 to 6 if LPN charge nurses are found to be employees. He found that this ratio was ''not remarkable'' citing *Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992).[58]

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[54] See *Polynesian Hospitality Tours*, 297 NLRB 228, 235–236 (1989) (recommendations not effective when the respondent had to check reliability of each report).

[55] The Regional Director found that LPNs did not possess the authority to effectively recommend discipline based on the fact that independent investigations were conducted before employees were disciplined. We agree with him on this point. However, the Regional Director also noted that ''associate memoranda pertain to patient care matters.'' The Employer strenuously disagrees. Because our finding does not rely on this factor, we have not addressed the Employer's arguments on this point.

[56] Cf. *Bayou Manor Health Center*, 311 NLRB 955 (1993); *Health Care & Retirement Corp.*, 310 NLRB at 1006–1007 (1993).

[57] The petitioned-for unit contains approximately 85 employees. Sixty-two, as outlined above, are in the nursing department and the 23 remaining employees are within the housekeeping and laundry, dietary, and maintenance departments. Each of these departments has its own supervisory hierarchy. Therefore, the employees outside the nursing department are not included in discussing ratio.

[58] The court stated in relevant part, ''A 1–6 ratio of supervisors to non-supervisory employees is not remarkable; a ratio of only 1 to 27, on the other hand 'raises a warning flag.' *American Medical Services*, 705 F.2d at 1473.'' 970 F.2d at 1555.

Contentions of the Parties

The Employer contends that shift ratios provide the only meaningful guidance. The Employer calculates these ratios of supervisors to employees based on its contention that the LPN charge nurses are supervisors as follows:

First shift	1 to 2
Second shift	1 to 5
Third shift	2 to 5

If the LPNs are employees, the Employer calculates the ratios as follows:

First shift	5 to 12
Second shift	1 to 5 or 0 to 12
Third shift	2 to 5 or 0 to 7

The Petitioner argues that the department ratios based on LPN employee status (10 to 62 or 1 to 6 for a 13-percent density) are entirely reasonable and notes that in *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir.), the court rejected 33 percent and found 13 percent reasonable. The Petitioner also relies on *Beverly California* in which the Sixth Circuit stated that a 25-percent or more supervisory status in a nursing home ''would make the ranks of supervisors pretty populous.'' 970 F.2d at 1555. The Petitioner notes that if LPNs are supervisors as the Employer contends, the ratio would be 21 to 51 or almost 30 percent (21 out of 72). Finally, the Petitioner also relies on *Children's Habilitation Center*, supra, in which the court found shift ratios an inappropriate consideration.

Analysis

Because we have found no primary indicia of supervisory authority, any examination of ratio, a secondary factor, would only be an attempt to bootstrap a supervisory finding in the absence of statutory indicia. However, we note for the future that the bargaining unit does not consist of shifts but of an entire unit of employees. In the future we will adopt the view of the Seventh Circuit rejecting shift ratios. See *Children's Habilitation Center*, supra at 132. We note that the Sixth Circuit has also adopted this method of calculating ratios. *Beverly California Corp. v. NLRB*, supra at 1556 fn. 8.

Sole Person in Charge of Facility

Facts

LPNs are at times the highest ranking personnel at the facility. The Employer's random sampling of schedules indicates that over a period of 252 shifts, on 50 shifts LPNs were the highest ranking personnel at the facility. Two of the schedules, however, may have reflected a higher rate of ''LPN as sole person in charge'' due to an extended illness of an RN who usually worked the second shift 8 out of 14 days. The director of nursing and director of staff development usually leave the facility around 4 to 4:30 p.m. The administrator leaves at 6 p.m. The record does not reflect when the assistant director of nursing leaves. After leaving they may be reached at home. However, there is no attempt made to provide 24-hour telephone availability.

Regional Director's Findings

Relying on *Phelps Community Medical Center*, 295 NLRB 486 (1989), and *Waverly-Cedar Falls Health Care*, 297 NLRB 390, the Regional Director found that the LPNs' presence as the sole person in charge on the third shift (and sometimes on the second shift) did not confer supervisory status. The Regional Director specifically noted testimony that the LPNs would call the director of nursing in the event of a problem.

Contentions of the Parties

The Employer asserts that the LPN charge nurses are supervisory because 20 to 25 percent of the time they are the highest ranking authority on the premises. The Employer notes that there is no policy requiring the director of nursing or another administrator to be available by telephone on a 24-hour basis.

Analysis

Because we have found no primary indicia of supervisory status, we decline to attach any significance to this secondary factor.

Miscellaneous

Derivative Evidence

The record contains a great deal of evidence regarding what can best be described as derivative evidence; i.e., evidence which emanates from the employment setting or from subjective feelings about employment matters. All employees are paid hourly and punch a timeclock in the employee breakroom. Aides are paid a starting hourly rate of $4.50. However, once certified, their rate is $4.85 per hour. LPNs are paid a starting hourly rate of $9.50. RNs begin at $10.50. The director of staff development, who is also hourly paid, earns $12.94 per hour. LPNs receive a 25-cent-per-hour shift differential for second- and third-shift duty. Aides do not receive the shift differential. All employees receive premium pay for working on their days off ($1 per hour), weekends ($2 per hour), and holidays ($3 per hour). All employees with 1-year seniority receive a $100 bonus if the facility receives an ''E'' award. The Employer provides $10,000 life insurance for LPNs; $5000 for aides.

Aides wear uniforms which are provided and laundered by the Employer. LPNs wear ''whites'' which they provide and launder themselves. The Em-

ployer conducts meetings called ''in-services'' in order to apprise all nursing personnel of new equipment and procedures. These are conducted about twice per month. Nurses' meetings are held once every 2 or 3 months and are attended by RNs and LPNs to discuss patient care. In the event of a disaster—fire, tornado, flood—the front charge nurse, whether an RN or LPN, is in charge. This evidence has been considered on the record as a whole. Aides perceive the charge nurse as the person who directs their work and they understand they are supposed to follow these directions or they may be subject to discipline. Aides are told in orientation that charge nurses are their direct supervisors. We decline to attach any statutory significance to this evidence in the face of insufficient statutory indicia of supervisory status.

Performance of Same Duties as RNs

The Employer also contends that because the LPNs perform the exact same duties as RNs and because the RNs are stipulated to be supervisors, the LPNs are also supervisors. The Petitioner stipulated that the RNs were ''ineligible to vote.''[59] Assuming arguendo that the parties stipulated that the RNs are supervisors, that is not the same as a Board finding, based on evidence that they are in fact supervisors. Accordingly, where, as here, the Board is charged with determining the status of another classification (LPNs), the asserted fact that the LPNs are identical in function to the RNs is not dispositive of the inquiry into the status of the LPNs.[60] In light of the extensive testimony in the record concerning the actual duties and responsibilities of the LPN charge nurses, we feel it more appropriate to make our findings as to the LPNs' status based on the testimony itself, rather than on any stipulation as to eligibility.

Conclusion

Based on our review of the record, we agree with the Regional Director that the LPNs do not possess any of the statutory indicia which establish supervisory status under Section 2(11) of the Act and that LPNs are not supervisors within the meaning of the Act.

ORDER

The Regional Director's decision is affirmed and the case is remanded to him for further appropriate action.

[59] We note that throughout discussions on the record during the hearing, various conflicting representations were made regarding the actual intent of the stipulation. The Employer argued that the stipulation went to supervisory status while the Petitioner argued that the stipulation went only to exclusion on the possible basis of professional and/or supervisory status. The stipulation clearly states only that RNs are ''ineligible to vote.'' However, the Petitioner's brief characterizes the stipulation as one of supervisory status. Therefore, our analysis must assume that, at this point, Petitioner concedes that RNs are supervisors even though its earlier stipulation remains ambiguous.

[60] The Employer cites no authority for its proposition that performing the same duties as the RNs automatically created supervisory authority in the LPNs. Had the RNs' supervisory authority been fully litigated and a finding of RN supervisory status made in the course of litigation, the Employer's argument might have more force. See, e.g., *NLRB v. St. Mary's Home*, 690 F.2d at, 1068 (4th Cir. 1982) (most significant fact in finding Mitchell to be a supervisor was that she performed exactly the same functions and exercised exactly the same powers as Patillo, an admitted supervisor).